

SERVICE DATE – OCTOBER 13, 2015

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 1128X

ENERGY SOLUTIONS, LLC, DBA HERITAGE RAILROAD CORPORATION—
ABANDONMENT EXEMPTION—IN ANDERSON
AND ROANE COUNTIES, TENN.

Digest:¹ This decision denies a petition for exemption filed by Energy Solutions, LLC (ES), to abandon approximately seven miles of rail line in Anderson and Roane Counties, Tenn. The Board finds that ES failed to demonstrate that scrutiny under the Board's full application process is not necessary to carry out the national rail transportation policy.

Decided: October 8, 2015

Energy Solutions, LLC (ES), d.b.a. Heritage Railroad Corporation (HRC), a Class III rail carrier, seeks an exemption under 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. § 10903 to abandon a line of railroad extending between a point of connection with Norfolk Southern Railway Company at or near Blair, Tenn. (milepost 0.0) and the end of the track at East Tennessee Technology Center at or near Oak Ridge, Tenn. (milepost 7.0), including approximately three miles of spur tracks in Anderson and Roane Counties, Tenn. (the Line). Notice of the filing was served and published in the Federal Register on July 16, 2015 (80 Fed. Reg. 42,165). The Board is denying the petition for exemption because the record does not support a conclusion that scrutiny under § 10903 is not necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. § 10101.

BACKGROUND

According to ES, the United States Army Corps of Engineers constructed the Line in 1943 in conjunction with the development of the Manhattan Project site, a K-25 uranium enrichment complex at Oak Ridge, Tenn., which is now known as the East Tennessee Technology Center. In its petition for exemption, filed on April 3, 2015, ES states that it operates over the Line as a common carrier pursuant to an easement granted by the United States Department of Energy (DOE). ES says that, in addition to its own company traffic, it handles traffic for five shippers on the Line: Olin Corporation (Olin), Greenfield Logistics, Southern

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

Appalachia Railway Museum, BNSF Logistics, and Oak Ridge National Lab. According to ES, 262 carloads were shipped by those five shippers in 2014.² ES seeks abandonment authority in order to extinguish its common carrier obligation over the Line. ES states, however, that it will continue to serve all of the existing shippers on the Line under contract following the proposed abandonment.

By decision served June 5, 2015, the Board directed ES to file supplemental information clarifying inconsistencies in the record. Specifically, the Board directed ES to describe the ownership of the Line, including whether ES's interest is a perpetual easement or a lease, and to identify who owns both the track material and the real estate under the Line. Additionally, the Board required that ES explain why ES may serve multiple parties for hire on a contract basis as a private carrier after the proposed abandonment is consummated. The Board directed ES to serve a copy of its petition for exemption on DOE and each of the existing shippers on the Line within five days of the service date of the decision and certify to the Board that it had done so. On June 10, 2015, ES represented to the Board that it served a copy of the Board's decision as instructed.

On June 26, 2015, ES filed the requested supplemental information. In its supplemental filing, ES clarifies that it owns the Line's track materials and that DOE owns the real estate underlying the Line. ES also explains that it operates over the Line pursuant to an easement, not a lease. According to ES, DOE granted an easement over the Line to HRC in 2002, when HRC was not yet a part of ES. See Heritage R.R.—Lease & Operation Exemption—Rail Line of U.S. Dep't of Energy, FD 34372 (STB served July 23, 2003).³ ES states that HRC subsequently assigned the easement to ES in 2009. See Energy Solutions—Acquis. & Operation Exemption—Heritage R.R., FD 35288 (STB served Sept. 3, 2009). ES also clarifies in its supplemental filing that it intends to provide contract carriage, not private carriage, over the Line following the proposed abandonment pursuant to Consolidated Rail Corp.—Petition for Declaratory Order, 1 I.C.C.2d 284 (1984) (Conrail).

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. § 10903, a rail line may not be abandoned or service discontinued without the Board's prior approval. Under 49 U.S.C. § 10502, however, the Board must exempt a transaction or service from regulation when it finds that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

ES argues that an exemption would further the RTP by expediting regulatory decisions; fostering sound economic conditions in transportation; reducing regulatory barriers to exit from

² ES Pet. 4.

³ ES states that the verified notice of exemption filed on July 1, 2003, in Docket No. FD 34372, mistakenly stated that HRC leased the Line from DOE, when HRC actually operated over the Line pursuant to an easement for right of way.

the industry; encouraging honest and efficient management of railroads; and providing for the expeditious handling and resolution of proceedings, in accordance with 49 U.S.C. § 10101(2), (5), (7), (9), and (15), respectively.⁴ While an exemption could further some of the RTP factors that ES asserts—specifically, expediting regulatory decisions, reducing regulatory barriers to exit, and providing for the expeditious handling and resolution of proceedings—the Board cannot conclude that continued regulation is not necessary to carry out the RTP. ES fails to present evidence showing any operating burden based on the costs of providing service compared to revenues from the current operations. See Wyo. & Colo. R.R.—Aban. Exemption—in Carbon Cty., Wyo., AB 307 (Sub-No. 5X), slip op. at 4 (STB served Nov. 10, 2004) (“In any abandonment case, whether authority is sought by petition for exemption or by application, the railroad must demonstrate that the line in question is a burden on interstate commerce.”). ES states only that the small volume of traffic for the shippers other than Olin does not produce revenues sufficient to offset ES’s costs for maintenance of way. Olin, however, accounted for 245 of the 262 carloads (over 93%) of all non-ES traffic that originated or terminated on the Line in 2014. Given the absence of any demonstrated economic burden on ES from providing common carrier rail service on the Line, the Board is not convinced that the transaction would foster sound economic conditions in transportation. 49 U.S.C. § 10101(5).

Moreover, the Board cannot conclude, as ES asserts, that other aspects of the RTP would not be adversely affected. Although ES states that it would serve the other five shippers on the Line pursuant to contract following the proposed abandonment, ES would have no common carrier obligation to provide such service. ES could end service on the Line at any time without Board authorization, and these shippers would lose their regulatory remedies for service failures or inadequacies. Accordingly, the Board cannot conclude that, in these circumstances, removing the Line from the national rail system would ensure the continuation of a sound rail transportation system to meet the needs of the public. 49 U.S.C. § 10101(4).

ES also appears to base its arguments in favor of the proposed abandonment on the fact that the shippers on the Line would continue to receive service from ES pursuant to contract for an unspecified period of time. Specifically, in response to the Board’s June 5 order directing it to explain “why ES could serve multiple parties for hire on a contract basis after abandonment . . . authority is consummated,” ES cites Conrail for the premise that post-abandonment transportation under contract is not subject to the Board’s jurisdiction.⁵

While we recognize the Conrail precedent has been relied on in certain prior situations, the Board has become concerned regarding the continued reliance on Conrail in support of requests by rail carriers to abandon a rail line (and extinguish the associated common carrier obligation) with the intention of ultimately continuing to serve multiple shippers on the same line under contract.⁶ The railroad industry has changed in significant ways since the Interstate

⁴ ES Pet. 6.

⁵ ES Supp. Info. at 3.

⁶ E.g., Almono LP—Aban. Exemption—in Allegheny Cty., Pa., AB-842X (STB served Jan. 13, 2004). The Board has also granted petitions for exemption under arguably analogous circumstances without explicitly referencing Conrail. See, e.g., Cincinnati, New Orleans, & Tex. (continued . . .)

Commerce Commission decided the Conrail case in 1984. At that time, the railroad industry was just emerging from a period of severe economic difficulties that had included widespread bankruptcy and deteriorating infrastructure, jeopardizing continued rail service for many customers. Since then, however, the economic viability of the railroad industry has improved considerably and the short-line railroad network has expanded. Reliance on Conrail here is particularly troublesome given the number of shippers on the Line, the significant number of carloads moved by those shippers, and the absence of other mitigating factors. For example, in Union Pacific Railroad—Abandonment Exemption—in Pottawattamie County, Iowa (Red Giant), AB 33 (Sub-No. 300X), et al. (STB served Jan. 20, 2012), one shipper purchased the line and the other shipper received a permanent access easement—protective measures that mitigated the removal of the common carrier obligation. By contrast, in Missouri Pacific Railroad—Abandonment in Harris County, Texas (Missouri Pacific), AB 3 (Sub-No. 105X) (ICC served Dec. 22, 1992), shippers did not purchase the line or receive permanent access easements, and instead, post-abandonment service was limited to a temporary contract.

We acknowledge that the agency has previously found certain transactions like the one in Missouri Pacific—where there were multiple active shippers, and there were no mitigating factors like the ones in Red Giant—to be consistent with the RTP. However, the Board has concerns with continued reliance on the analysis applied in such cases, taking into account the changes in the rail industry and the nature of the transaction proposed here, as discussed above. Given these concerns, we believe that the better RTP analysis is described in this decision.

The Board concludes that ES has failed to establish, and the record does not support a determination, that scrutiny under 49 U.S.C. § 10903 is not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101.⁷ Consequently, the Board denies ES's petition to abandon the Line through the Board's exemption procedures.

It is ordered:

1. The petition for exemption is denied.
2. This decision is effective on the date of service.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Miller.

(. . . continued)

Pac. Ry.—Aban. Exemption—in Roane Cty., Tenn., AB 290 (Sub-No. 280X) (STB served Feb. 23, 2007).

⁷ Having found that a grant of exemption would not be consistent with the rail transportation policy, an analysis of whether the exemption would be of limited scope or an abuse of market power is unnecessary.